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Supreme Court, U.S.
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NO. 97-1063

In the
Supreme Court of the United States
OCTOBER TERM, 1997

NEWTON VEDALIER
Petitioner,

versus

FALCON DRILLING COMPANY, INC. AND LIVERPOOL AND LONDON STEAMSHIP PROTECTION AND INDEMNITY ASSOCIATION, LIMITED,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TO THE HONORABLES, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

STATEMENT OF THE CASE

I. FACTS

This civil lawsuit for damages under the Jones Act and the General Maritime Law arose out of an alleged accident which occurred on July 2, 1994, while petitioner, Newton Vedalier, was employed by Respondent, Falcon Drilling Company, Inc., and working aboard the Falrig No. 9, an inland drilling barge owned by Falcon. The Rig No. 9 had completed a job in shallow waters of the Gulf of Mexico off the coast of Louisiana and was in tow in inland waters to Lake De Cade in Terrebonne Parish, Louisiana, to be stacked pending another job. The job of Petitioner's crew while the Rig No. 9 was in tow was to wash out sediment that had accumulated in the ballast tanks of the rig when the tanks were flooded to set the rig on a location.

Petitioner's crew began its twelve hour shift at 6:00 a.m. July 2, 1994. Harlan Peak, Petitioner's supervisor, conducted a pre-shift safety meeting at which he instructed the crew on the proper procedures for cleaning the tanks. Mr. Peak instructed the crew, among other things, to work in pairs and that the first man into the tank should wait for his fellow worker before beginning work. The tanks were entered by climbing down a ladder from the deck of the rig to the bottom of the tank.

Petitioner's crew was then divided into groups of two and assigned to particular tanks. Petitioner was assigned to work with Brad Prosperie, a senior hand on the rig. Petitioner and Mr. Prosperie worked together for approximately six hours cleaning two tanks. Mr. Prosperie was asked to perform work elsewhere and was replaced by Ronald Toney. Petitioner and Mr. Toney were asked by the derrickman, Howard White, to exit the tank and help him move some equipment to another tank. Petitioner and Mr. Toney assisted Mr. White. They then returned to finish cleaning the tank in which they had been working. Petitioner descended the ladder first and began working. Mr. Toney descended after Petitioner had reached the bottom of the tank. When Mr. Toney reached the bottom of the tank, Petitioner told him that he had fallen and hurt his back.

Mr. Toney then helped Petitioner to the ladder and petitioner climed the ladder on his own. When Petitioner reached the top of the tank, Mr. White and Mr. Prosperie helped him out of the tank and notified Mr. Peak. Mr. Peak brought Petitioner to the toolpusher, Curtis Crutchfield, who completed an accident report. Mr. Crutchfield examined petitioner but did not find any marks, bruises, or cuts evidencing a fall. Mr. Crutchfield then sent Petitioiner to shore where a Falcon employee took him to Terrebonne General Medical Center in Houma, Louisiana. Petitioner was treated at the emergency room of Terrebonne General Medical Center by Dr. Stehen Mallernee. Petitioner complained of tenderness in his mid and low back. Dr. Mallernee's examination did not, however, reveal any evidence of trauma such as swelling or discoloration. X-rays of Petitioner's cervical and lumbar spine were negative for any indication of acute trauma. Notwithstanding the questionable accident and injury,

Falcon commenced payment of maintenance and cure.

Petitioner subsequently underwent treatment by Dr. Clifton Shepherd, an orthopedic surgeon in Lafayette, Louisiana, Dr. John Cobb, another orthopedic surgeon in Lafayette, Louisiana, and Dr. Daniel Hodges, a physical medicine specialist in Lafayette, Louisiana. A lumbar MRI, lumbar CT scan and EMG/nerve conduction studies of Petitioner's lower extremities were performed and were normal. Dr. Shepherd diagnosed a low back strain/sprain type of injury. He was of the opinion that Petitioner reached maximum medical improvement by August 17, 1994, and he released Petitioner to return to unrestricted duty. Dr. Cobb, Petitioner's choice of physician, was of the opinion that Petitioner suffered a strain/sprain type hyper-extension injury and reached maximum medical improvement by March 31, 1995. Dr. Cobb referred Petitioner to Dr. Hodges so Dr. Hodges could return him to work. Dr. Hodges released Petitioner to return to light duty work on June 8, 1995, with the hope of advancing him to medium duty. Based on the opinions of Drs. Shepherd and Cobb that Petitioner had reached maximum medical improvement, Falcon terminated Petitioner's maintenance and cure on October 4, 1995.

Despite the opinions of Drs. Shepherd, Cobb, and Hodges, Petitioner's attorney referred him to Dr. Stuart Phillips, an orthopedic surgeon in New Orleans, Louisiana. Dr. Phillips reviewed the lumbar MRI, lumbar CT scan and EMG/nerve conduction studies performed at the request of Dr. Shepherd and was of the opinion that they were normal. He recommended that those tests be repeated and they were normal again. Notwithstanding all of the foregoing,

Dr. Phillips recommended a discogram at the L3-4. L4-5 and L5-1 levels. He was of the opinion that the discogram was positive at L4-5 and he recommended an anterior lumbar fusion at that level which was performed on October 10, 1995.

II. COURSE OF PROCEEDINGS AND DISPOSITION IN COURTS BELOW

Petitioner filed suit against Falcon on January 5, 1995 claiming his entitlement to damages pursuant to the Jones Act and General Maritime Law, maintenance and cure, and penalties and attorney's fees for Falcon's alleged arbitrary and capricious failure to pay maintenance and cure. Petitioner amended his suit on August 29, 1995 to name Falcon's underwriter, Liverpool and London Steamship Protection and Indemnity Association, Limited, as a defendant.

On September 22, 1995, Falcon filed a motion for summary judgment seeking dismissal of Petitoner's claim for punitive damages. Petitioner did not oppose the motion and the District Court dismissed Petitioner's claim for punitive damages on December 12, 1995.

A bench trial was held before the Honorable Richard J. Putnam, Senior United States District Judge, on March 25 - 28, 1996. At the close of evidence, Judge Putnam dismissesd Petitioner's claim for attorney's fees for Falcon's alleged arbitrary and capricious failure to pay maintenance and cure. Judge Putnam took the remainder of Petitioner's claims under advisement.

Judge Putnam issued a Memorandum Ruling on April 22, 1996 dismissing Petitioner's claims for damages under

the Jones Act because Petitioner did not prove that Falcon demonstrated even the slightest negligence with regard to its actions surrounding his accident. In that regard, Judge Putnam found that Falcon properly trained and supervised Petitioner. Petitioner was instructed to wait for his fellow workers before beginning to work. Petitoner began working before his fellow worker descended into the tank and he lost balance and fell. Judge Putnam found that Petitoner was solely at fault for his accident. Judge Putnam also found that Falcon was not negligent in instructing Petitioner to clean the ballast tanks while the Rig No. 9 was in tow because the Rig No. 9 was not moving at the time of Petitioner's fall. Judge Putnam denied Petitioner's claim under the General Maritime Law because the Rig No. 9 was seaworthy. Judge Putnam found, however, that Petitioner had not reached maximum medical improvement. He, therefore, awarded Petitioner maintenance and cure at the stipulated rate of $20 per day from October 6, 1996 until he reached maximum medical improvement, plus outstanding medical bills incurred for Dr. Phillips' treatment in the amount of $51,092.23.

Judgment was entered on August 20, 1996. All parties filed Notices of Appeal to the United States Court of Appeals for the Fifth Circuit on September 18, 1996. Petitioner appealed Judge Putnam's dismissal of his claims for damages under the Jones Act and the General Maritime Law and his claim for attorney's fees for Falcon's alleged arbitrary and capricious failure to pay maintenance and cure. Respondents appealed Judge Putnam's finding that the surgery performed by Dr. Phillips was medically necessary because Dr. Phillips relied solely upon the results of the discogram, a controversial diagnostic test. Both appeals were placed on the Fifth Circuit's summary calendar in accordance with the

Fifth Circuit's Local Rules and Internal Operating Procedures. By Opinion entered on October 1, 1997, the Fifth Circuit affirmed Judge Putnam's judgment in all respects on the grounds that a review of the record and briefs revealed that no clear error occurred. The Fifth Circuit determined that the Opinion should not be published pursuant to Local Rule 47.5. Respondents are not seeking review of the Fifth Circuit's Opinion.

LAW AND ARGUMENT

Respondents initially submit that this Court should deny Petitioner's writ because Petitioner has not set forth any basis for this Court to exercise its discretion to grant certiorari to review this case. Rule 10 (a) of this Court's Rules provides an illustrative list of the character of the reasons the Court considers to grant certiorari, none of which are present in this case. Petitioner stated in his petition that this matter presents an issue - the propriety of the Fifth Circuit's summary procedures - which constitutes an important question of federal law which has not been, but should be, settled by this Court. This Court has, however, considered and approved the summary procedures used by the Fifth Circuit in this case in *Taylor v. McKeithen*, 407 U.S. 191, 32 L.Ed.2d 648, 92 S.Ct. 1980 (1972). Respondents, therefore, respectfully request that this Court summarily deny Petitioner's petition.

In the event, however, this Court decides to consider Petitioner's petition, Respondents request that this Court deny Petitioner's petition for the following reasons.

I. The summary disposition of this matter by the Court of Appeals for the Fifth Circuit complied with the statutory duties imposed upon that Court and did not violate Petitioner's right to statutory review of an adverse final judgment rendered by the District Court.

The statutory duties governing the Fifth Circuit's summary disposition of this matter are found in the Fifth Circuit's Local Rule 47.6 which provides:

> The judgment or order may be affirmed or enforced without opinion when the court determines that an opinion would have no precedential value and that any one or more of the following circumstances exists and is dispositive of a matter submitted for decision: (1) that a judgment of the district court is based on findings of fact that are not clearly erroneous; (2) that the evidence in support of a jury verdict is not insufficient; (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; (4) in the case of a summary judgment, that no genuine issue of material fact has been properly raised by the appellant; and (5) no reversible error of law appears. In such case, the court may, in its discretion, enter either of the following orders; "AFFIRMED. See 5TH CIR.R.47.6," or "ENFORCED, See 5TH CIR.R.47.6."[1]

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[1] 28 USC §2071 gives court of appeals the authority to prescribe local rules. Those local rules have the force of statute, *Groendyke Transport,*

This Court has approved the above quoted Local Rule in *Taylor v. McKeithen*, 407 U.S. 191, 32 L.Ed.2d 648, 92 S.Ct. 1980 (1972), in which this Court stated in Footnote 4 that:

> We, of course, agree that the court of appeals should have wide latitude in their decisions of whether or how to write opinions. That is especially true with respect to summary affirmances. See Rule 21, Court of Appeals for the Fifth Circuit.[2]

Although Chief Justice Rehnquist disagreed with the majority's holding in *Taylor*, he agreed that the court of appeals should have wide latitude in their decisions. He stated in his dissent:

> While an opinion from the Court of Appeals fully explaining the reason for its reversal of the District Court would undoubtedly be of assistance to our exercise of certiorari jurisdiction herein, it is by no means essential.

. . .

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footnote 1 continued

Inc. v. Davis, 406 F.2d 1158 (5th Cir. 1969), *cert. denied* 394 U.S. 1012, 23 L.Ed.2d 39, 89 S.Ct. 1628 (1969).

[2] Local Rule 47.6 is the successor of and almost identical to Rule 21 which provided; "When the Court determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the Court for decision: (1) that a judgment of the District Court is based on findings of fact which are not clearly erroneous; (2) that the evidence in support of a jury verdict is not insufficient; (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; (4) that no error of law appears; and the Court also determines that an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

> The courts of appeals are statutory courts, having the power to prescribe rules for the conduct of their own business so long as those rules are consistent with applicable law and rules of practice and procedure prescribed by this Court, 28 USC §2071. No existing statute or rule of procedure prohibits the Fifth Circuit from issuing a short opinion and order, as it has done here, or from deciding cases without any opinion at all. Cf. Rule 21, Court of Appeals for the Fifth Circuit. The courts of appeals, and particularly the Fifth Circuit, which has experienced the heaviest caseload of all the circuits, need the maximum possible latitude to deal with the "flood tide" of appeals that the "ever growing explosive increase" of federal judicial business has produced. See *Isbell Enterprises, Inc. v. Citizens Casualty Co. of N.Y.*, 431 F.2d 409 (5th Cir. 1970); *N.L.R.B. V. Amalgamated Clothing Workers*, 430 F.2d 966 (5th Cir. 1970).
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> . . .
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> I think decisions as to whether opinions should accompany judgments of the courts of appeals, and the desirable length and content of those opinions are matters best left to the judges of the courts of appeals.[3]

The Fifth Circuit's Local Rule 47.6 authorizes the Fifth Circuit to affirm without opinion when the district court's findings of fact are not clearly erroneous.[4] The Fifth Circuit

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[3] *Taylor*, 32 L.Ed.2d at 651-652.

[4] Similarly, Federal Rule of Apellate Procedure 36 acknowledges that judgments can be entered without an opinion.

issued a two page Opinion in this matter in which it discussed the factual findings of the District Court and then stated:

> We have reviewed the record and the briefs on appeal and conclude that no clear error occurred.
>
> Accordingly, the judgment of the district court is AFFIRMED.[5]

Since Local Rule 47.6 authorizes the Fifth Circuit to affirm without opinion when the district court's findings of fact are not clearly erroneous, Respondents submit that the Fifth Circuit's Opinion in this matter was more than required by its statutory duties.

Petitioner argues that the creation of courts of appeals as a "court of record" by 28 USC §43 requires courts of appeals to set forth legal reasoning in non-frivolous appeals. A review of 28 USC §43 shows, however, that it refers only to the creation of courts of appeals. Section 43 does not imposes any statutory duties upon courts of appeals. Petitioner has not cited any authority for his argument. The jurisprudence interpreting 28 USC §43 is sparse and does not include any cases supporting Petitioner's argument.

Petitioner's argument that the Fifth Circuit's failure to articulate the legal reasoning supporting its Opinion deprived him of his right to intelligently and effectively assess the Fifth Circuit's decision to determine whether to seek review is meritless because the District Court set forth detailed reasons. Petitioner was able to intelligently and effectively

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[5] See Appendix to Petitioner's petition, p. 3.

assess the District Court's decision to determine whether to file an appeal to the Fifth Circuit. The Petitioner was in basically the same position when he assessed the Fifth Circuit's decision which found no error in the District Court's findings. How would a discussion by the Fifth Circuit of the Factual findings that it found were not error be anything more than a recitation of the District Court findings? That question is best answered by the Sixth Circuit's reasoning where it stated:

> It is not the policy or practice of this court, in reviewing cases on appeal where a District Court has rendered a comprehensive opinion with which we find ourselves in full agreement, to re-write such an opinion and, in a sense, deprive the trial court of the credit of its careful consideration of the issues and arguments, and complete determination of the cause.[6]

Based on all of the foregoing, Respondents submit that Petitioner's argument that he could not intelligently and effectively assess the Fifth Circuit's decision to determine whether to seek review is meritless.

For the reasons discussed above, Petitioner's attempt to analogize summary dispositions by district courts with summary dispositions by courts of appeals is inappropriate as well. As discussed above, the Fifth Circuit's Local Rules allow the Fifth Circuit to issue a summary ruling when the district court has issued findings of fact which are not clearly erroneous. In that case, as in the instant matter, the record

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[6] *U.S. v. "Cal's Tupelo Blossum U.S. Fancy Pure Honey"*, 344 F.2d 288, 289 (6th Cir. 1965).

contains findings of fact. The situation is totally different when a district court issues a summary disposition and the record does not contain any findings of fact.

II. The summary disposition of this matter by the Court of Appeals for the Fifth Circuit did not violate Petitioner's right to due process of the law and equal protection of the law.

Although this Court did not specifically address the constitutional validity of the Fifth Circuit's summary procedures in *Taylor, supra*, this Court discussed factors which satisfy the constitutional questions presented by Petitioner. In that regard, Chief Justice Rehnquist discussed that the summary procedures were justified based upon the caseload of the Fifth Circuit. The specific reasons for enacting the summary procedures are discussed in detail in the case cited in Footnote 2 to Chief Justice Rehnquist's dissent, *N.L.R.B. v. Amalgamated Clothing Workers*, 430 F.2d 966 (5th Cir. 1970). In that case, the Fifth Circuit addressed Rule 21 and balanced the need for written opinions against the limited and precious judicial resources. The Fifth Circuit supported summary opinions pursuant to Rule 21 by stating that:

> in a number of cases there is no real need for an opinion at all. Where in a given case that is the considered judicial judgment of three Judges comprising a panel, then it is perfectly obvious that the now limited and precious judicial resources can be husbanded by a procedure which eliminates that unnecessary opinion.
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> . . .

> little is to be served by an elaborate discussion or for that matter a discussion at all on the underlying facts which the Court, after mature study, is convinced are not demonstrated to be clearly erroneous under F.R.Civ.P. 52(a).
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> . . .
>
> Rule 21 should make a real contribution toward the goal of awarding delays which can often amount to a denial of justice.[7]

Respondents submit that the reasoning set forth in *N.L.R.B.* sufficiently satisfies the constitutional questions presented by petitioner. In that regard, this Court has held that due process generally requires consideration of three distinct factors; first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest, including the function involved in the physical and administrative burdens that the additional or substitute procedural requirement would entail. *Mathews v. Eldridge*, 424 U.S. 319, 47 L.Ed.2d 18, 33, 96 S.Ct. 893 (1976). Petitioner's equal protection concerns will be satisfied if a rational policy reason for the summary procedures is present since the Fifth Circuit's exercise of its summary procedures did not jeopardize a fundamental right or categorize on the basis of an inherently suspect classification. *Nordlinger v. Hahn*, 505 U.S. 1, 120 L.Ed.2d 1, 12, 112 S.Ct. 2326 (1992).

For the reasons discussed above, Respondents submit

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[7] *N.L.R.B., supra* at 971-972.

that the Fifth Circuit's interest in balancing unnecessary opinions against the limited and precious judicial resources satisfies due process and equal protection. The analysis is best answered by the Fifth Circuit in *Groendyke Transport, Inc.* where the Court stated:

> Indeed, the due process and equality so cherished is denied by the very process of nominally treating all cases alike. Thus every time a frivolous appeal or one in which there is a practical certainty how it must be decided is calendared and argued orally, some other litigant with a meritorious appeal, presenting serious questions of law for consideration by the Court is deprived of his place at the bar.
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> . . .
>
> When a case is frivolous or its outcome so certain as a practical matter the appellate court is not compelled to sacrifice either the rights of other waiting suitors, its own irreplaceable judgetime or administrative efficiency in judicial output by a traditional submission with all the trappings.
>
> We therefore find more than ample authority for summary disposition by the Court on its own motion or that of a party. Having determined that we have the power, we summarily reverse. The fact that we termed this a "summary" reversal does not imply that the legal question presented was not thoroughly considered on its merits.[8]

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[8] *Groendyke, supra* at 1162-1163.

CONCLUSION

Respondents request that this Court summarily deny Petitioner's petition because the issue presented - the propriety of the Fifth Circuit's summary procedures - has been considered and approved by this Court in *Taylor v. McKeithen*, 407 U.S. 191, 32 L.Ed.2d 648, 92 S.Ct. 1980 (1972).

In the event, however, this Court decides to consider Petitioner's petition, Respondents submit that the summary disposition of this matter by the Court of Appeals for the Fifth Circuit complied with the statutory duties imposed upon that Court which allowed the Fifth Circuit to issue a summary opinion, or no opinion at all, where the Fifth Circuit's opinion was that the judgment of the District Court is based on findings of fact that are not clearly erroneous. Lastly, Respondents submit that the summary disposition of this matter by the Fifth Circuit did not violate Petitioner's right to due process of the law and equal protection of the law because the Fifth Circuit's interest in balancing unnecessary opinions against the limited and precious judicial resources satisfies due process and equal protection.

WHEREFORE, Respondents, Falcon Drilling Company, Inc. and Liverpool and London Steamship Protection and Indemnity Association, Limited, pray that this Honorable Court deny Petitioner's Petition for Writ of Certiorari.

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